

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**In re:**

**DEBORAH SINGER,**

**Debtor.**

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**Case No. 00-08620-6B3**

**MEMORANDUM OPINION**

At Orlando, in said District on May 22, 2001, before Arthur B. Briskman, Bankruptcy Judge.

This matter came on the Confirmation of Debtor's Chapter 13 Plan, the Trustee's Motion to Convert the Case to Chapter 7 (Doc. No. 25), the Debtor's Verified Notice of Voluntary Dismissal (Doc. No. 28), the Objection to Dismissal by the Chapter 13 Trustee (Doc. No. 31) and Motion to Dismiss for Bad Faith by Artisan Contractors Association of America, Inc. (Doc. No. 27). Appearing were Laurie K Weatherford, Chapter 13 Trustee, Stephen Milbrath, attorney for Artisan Contractors Association, Jack Spears, attorney for Frontier Insurance Company, and Kevin Mangum, attorney for the Debtor. The Debtor did not appear at the hearing. After reviewing the pleadings and evidence, and hearing live testimony and arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

Deborah Singer (the "Debtor") filed for relief under Chapter XIII of the United States Bankruptcy Code on November 1, 2000.

The Debtor and the Debtor's company, The James Brokerage, Inc. ("James") and a principal of James, Frontier Insurance Company, Inc. ("Frontier") were defendants in litigation in United States District Court for the Middle District of Florida (Case No. 6:98-cv-941-Orl-31DAB) commenced by Artisan Contractors Association of America, Inc. ("Artisan"). Artisan alleged copyright infringement, service mark infringement, dilution and unfair competition arising from a business relationship between Artisan, the Debtor, James and Frontier. The Debtor asserted her Fifth Amendment privilege against self-incrimination on numerous occasions during discovery, which limited the amount of discoverable information attained by Artisan. The Debtor filed for relief under Chapter XIII of the Bankruptcy Code on November 1, 2000, three days prior to the trial in the District Court proceedings. The action was stayed as to the Debtor and James, but proceeded as to Frontier. A judgment was entered against Frontier for approximately \$77,000.00.

The Debtor filed the petition and attended a meeting of creditors, but all other actions of the Debtor indicated she did not intend to reorganize her debts in bankruptcy. The Debtor did not make any of her scheduled plan payments; even though she represented in her schedules she had \$25,000.00 to \$50,000.00 in a bank account and had the ability to make payments. The Debtor knew of her obligation to file tax returns, but did not file them and did not respond to the Chapter XIII Trustee's motion to dismiss for failure to file tax returns. The Debtor failed to appear at the May 22, 2001 hearing, despite an order from the Court and direction from her attorney to attend. These actions illustrate the Debtor did not intend on fulfilling her obligations under the Bankruptcy Code, after the filing of her petition.

"Cause" exists to warrant a dismissal of the Debtor's case with a concurrent bar to discharge all debts existing prior to the Debtor's filing her petition in the instant bankruptcy

case. The Debtor's conduct in the bankruptcy proceeding, her assertion of privilege during District Court discovery and the timing of the filing her bankruptcy petition establish the filing of her bankruptcy petition was to frustrate the pending litigation in District Court. The Debtor's actions constitute egregious conduct and a lack of good faith, which constitute sufficient "cause" to impose a dismissal and bar discharge pursuant to 11 U.S.C. §349(a).

### **CONCLUSIONS OF LAW**

11 U.S.C §349(a) authorizes a court to dismiss a bankruptcy case and concurrently bar the debtor from obtaining a discharge with regard to the debts existing prior to the Debtor's current bankruptcy filing. 3 L. King, Collier on Bankruptcy ¶ 349.02[2], p. 349-8,9 (15<sup>th</sup> ed. 2001). Section 349(a) provides in relevant part:

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar discharge, in a later case under this title, of debts that were dischargeable in the case dismissed ...

"Cause" is not specifically defined in the Bankruptcy Code, however, courts have generally considered "cause" under §349(a) to include bad faith or lack of good faith. *In re Leavitt*, 171 F.3d 1219, 1224 (9<sup>th</sup> Cir. 1999); *In re Casse*, 198 F.3d 327, 337 (2d Cir. 1999); *In re Tomlin*, 105 F.3d 933, 937 (4<sup>th</sup> Cir. 1997); *In re Frieouf*, 938 F.2d 1099, 1104 (10<sup>th</sup> Cir. 1991); *Hall v. Vance*, 887 F.2d 1041 (10<sup>th</sup> Cir. 1989). "[B]ad faith" is a term used to describe a broad range of improper conduct, only some of which is sufficient to support a dismissal with a concurrent bar to subsequent discharge of existing debts. *In re Hall*, 258 B.R. 908, 911 (Bankr.N.D.Ind. 2001). "Bad faith" as cause for this type of dismissal must rise to the level of egregious misconduct, contemptuousness, malfeasance or systemic abuse. *Id.* (citing *In re Grieshop*, 63 B.R. 657, 663 (Bankr.N.D.Ind. 1986)).

A determination of bad faith requires the application of the “totality of the circumstances” test. A court should consider factors such as: (1) whether the debtor “misrepresented facts in her petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed her Chapter 13 petition or plan in an equitable manner; (2) the debtor’s history of filings and dismissals; (3) whether the debtor only intended to defeat state court litigation; and (4) whether egregious behavior is present. *Leavitt* at 1224 (*citations ommitted*).

The application of the totality of the circumstances test requires a finding the Debtor did not act in good faith and unduly prejudiced her creditors in the current bankruptcy case. The central purpose of the Bankruptcy Code is to provide procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy new opportunity in life with clear field for future effort, unhampered by pressure and discouragement of preexisting debt. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991) (*citing Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)).

The Debtor has not demonstrated an intention of reorganizing. The Debtor had the ability to make plan payments and knew she was required to make plan payments, but failed to make a single payment under her plan of reorganization. The Debtor did not file her tax returns, despite knowing filing returns was a requirement to proceed. The Debtor intentionally disregarded this Court’s order and advice from her own counsel, when she did not attend the hearing concerning this matter on May 22, 2001.

The Debtor has abused the bankruptcy process by improperly using her filing as a litigation tool to circumvent the District Court proceedings. The Debtor asserted her Fifth Amendment privilege against self-incrimination on numerous occasions during discovery,

which limited the amount of discoverable information available to Artisan.<sup>1</sup> The Debtor filed for relief three days prior to the trial in the District Court proceedings. These two facts coupled with the Debtor's conduct during the administration of her bankruptcy case establish the Debtor's lack of good faith in filing her bankruptcy petition.

A dismissal order that bars subsequent litigation is a severe sanction warranted only by egregious conduct. *In re Tomlin*, 105 F.3d 933, 937 (4<sup>th</sup> Cir. 1997) (citing *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366, 368 (5<sup>th</sup> Cir. 1967)). The Debtor seeks all of the benefits of bankruptcy, but has intentionally failed to fulfill her obligations and duties required pursuant to the Bankruptcy Code. The Debtor's lack of good faith and conduct is egregious and establishes cause to warrant dismissal of her bankruptcy case with a concurrent bar to discharge of all debts existing at the time of the Debtor's filing her Chapter XIII petition in the instant case.

Artisan's Motion for Dismissal for bad faith is due to be granted. The Debtor's case is to be dismissed and pursuant to 11 U.S.C. §349(a) all debts existing prior to the Debtor's filing of her instant bankruptcy case are barred from discharge in any subsequent proceeding..

Dated this   1st   day of August, 2001.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge

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<sup>1</sup> The assertion of a Fifth Amendment privilege would not by itself be indicative of bad faith. *In re McCormick*, 49 F.3d 1524, 1527 (11<sup>th</sup> Cir. 1995). The Debtor's assertion of her Fifth Amendment privilege is considered an indication of a lack of good faith in this case, since the totality of the circumstances present here evidences a pattern of conduct by the Debtor to obstruct the adjudication of Artisan's lawsuit.